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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF the United States, and Frederick W. Coleman, Chief of Finance, U.S. Army

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE COMPTROLLER GENERAL OF THE UNITED STATES

OPINIONS BELOW

The memorandum opinions of the Supreme Court of the District of Columbia (R. 10–12, 33) and the final decree for injunction entered by that court (R. 33–34) are not reported. The opinion of the Court of Appeals of the District of Columbia (R. 42–48) is reported in 66 F. (2d) 564.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered June 26, 1933 (R. 42–49). The petition for certiorari was filed September 6, 1933, and was granted October 23, 1933. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat., 938–939.

QUESTION PRESENTED

Whether injunction lies in the Supreme Court of the District of Columbia to compel the Chief of Finance as an unbonded subordinate in the War Department, to pay or cause payment to be made and to compel the Comptroller General of the United States to approve and allow credit for the payment of retired pay and allowances to the petitioner, a native Filipino and former enlisted man of the Philippine Scouts, after the Comptroller General of the United States, on application for decision by an Army disbursing officer, before whom a voucher covering such claim for retired pay and allowances was pending for payment, has rendered his decision holding such payment is not authorized under existing appropriations.

STATUTES INVOLVED

The statutes involved, with pertinent legislative and judicial history, are set forth in the brief of the Comptroller General of the United States, filed in

opposition to the petition for a writ of certiorari, at pp. 3–5 and 29–43.

STATEMENT

Special Orders No. 207 of the War Department dated September 3, 1931 (R. 1–2, 13, 42) announced respecting the petitioner as follows:

> 35. Master Sergeant Santos Miguel, R–320883, Service Company, 45th Infantry (PS) will be placed on the retired list at Fort William McKinley, P.I. effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service. QM 1600 A 211–2 (A.G. 220.85) (4–3–21)
>
> By order of the Secretary of War.
>
> DOUGLAS MACARTHUR,
> *General,*
> *Chief of Staff.*

A voucher covering the claim of the petitioner to retired pay and allowances for the month of November, 1931, in the gross amount of $50.81 having been presented to the bonded Army disbursing officer, Headquarters, Philippine Department, for payment, that official, stating his doubts whether payment of the claim was authorized, forwarded the voucher to the Comptroller General of the United States on November 5, 1931, through the Chief of Finance, with request for an advance decision as to the legal authority for payment (R. 15–16, 43).

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This request of the disbursing officer for a decision was forwarded to the Comptroller General of the United States from the War Department, Office Chief of Finance, by a 1st Indorsement of December 16, 1931, asking that the decision when rendered be forwarded to the disbursing officer through that office and advising that the request for advance decision was made "under the authority contained in the act of July 31, 1894 (28 Stat., 208; U.S.C. 31: 74)." (R. 16–17.)

The decision rendered by the Comptroller General to the disbursing officer through the Chief of Finance on January 19, 1932, 11 Comp. Gen. 275, concluded as follows:

> You are not authorized to pay the voucher which will be retained in the files of this office. (R. 17, 24–30, 43.)[1]

On February 15, 1932, the Secretary of War, claiming to act under section 148 of the Judicial Code, requested the United States Court of Claims to review the decision, stating as follows:

> * * * The Comptroller General, on January 19, 1932, rendered his advance de-

[1] The statement in petitioner's brief (p. 3) that on April 3, 1931, he made application in writing to the President that he be placed on retired list and the statement therein as to the manner and form of petitioner's enlistments (pp. 4 and 13 footnote) appear to be "off the record" and have reference to matters not before the Comptroller General in connection with the decision which this Court now, in effect, is asked to review as upon a writ of error (R. 13–14).

> cision to Major Beard, denying the latter's authority to pay said voucher * * *
>
> The War Department finds itself unable to accept or concur in this advance decision of the Comptroller General. * * *

That reference by the Secretary of War is pending before the Court of Claims docketed as Departmental Reference No. 169 (R. 23; Comptroller General's brief in opposition to petition, pp. 9–10). Whether or not the Court of Claims has jurisdiction to decide the question thus presented to it, that Court would have jurisdiction to decide the legal merits of the plaintiff's claim to retired pay and allowances and to give judgment thereon (R. 10, 11, 23).

On April 27, 1932,[2] the petitioner filed his bill for injunction to enjoin the Comptroller General from giving the effect to the decision in the settlement of the public disbursing accounts which the statute under which the decision was rendered requires;

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[2] It is noteworthy that on this same day, April 27, 1932, on the floor of the House (75 Cong. Record 9072) Mr. McDuffie of the Committee on Economy explained the purpose of the economy provision enacted as section 301 of the act of June 30, 1932, 47 Stat. 382, 407, which provides: "The President is authorized at any time to disband the Philippine Scouts or to reduce the personnel thereof."

The explanation of Mr. McDuffie was in reply to a question as follows:

"Mr. BRITTEN. * * * I thought the gentleman had some other data showing the President's suggestions as compared with the suggestions which he is now presenting.

"Mr. MCDUFFIE. * * * There were, of course, some changes. For instance, the President suggested that we cut

also, to require the Comptroller General to return the voucher to the disbursing officer and to compel the Chief of Finance of the Army to pay or cause the voucher to be paid (R. 1–6, 17–18, 43).

The United States Attorney for the District of Columbia filed motions to dismiss the petitioner's bill of complaint (R. 7–10), which motions to dismiss were overruled (R. 10–12), whereupon the Comptroller General answered the bill (R. 12–30). The petitioner moved to strike this answer, which motion was sustained (R. 32, 33) and final decree was entered in the Supreme Court of the District of Columbia (R. 33–35). The Court of Appeals of the District of Columbia reversed this decree and directed dismissal of the petitioner's bill (R. 42–49).

The allegations of the entire answer of the Comptroller General (R. 12–30) are taken as conceded for purposes of ruling on the issues in the record raised by the petitioner's motion to strike and for decree *pro confesso* (R. 32–33). Among other matters the record thus establishes:

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out the Philippine Scouts or have the Philippine Government pay that expense. We eliminated that item from the bill and authorized the President to disband the Scouts, if necessary. He has that authority now, and can save $5,000,000 by disbanding the Philippine Scouts."

The passage of the Philippine Independence Act of January 17, 1933, 47 Stat. 761, in the face of opposition from the Secretary of War (75 Cong. Record 12832) and over Presidential veto (47 Stat. 770) made the provision for disbanding the Philippine Scouts of no immediate importance.

(1) The procedure set forth in the regulations of the War Department, promulgated for the guidance of disbursing officers and other officials of that department in obtaining decisions from the Comptroller General of the United States on questions involving payments to be made by them or under them, was observed by the disbursing officer and the Chief of Finance in obtaining the decision on the petitioner's claim for payment (R. 18–20).

(2) *It has been the practice (which is undisputed and otherwise abundantly appears from the decided cases) of the Comptrollers followed without interruption, at least since the act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether a payment on a claim is authorized to be made under appropriated moneys of the United States, except in those rare cases where the Congress, by specific language, has made the finding or decision of some other official conclusive in that respect* (R. 20).

(3) The Comptroller General did not coerce or even invite the application of the disbursing officer and the Chief of Finance for an advance decision, nor has he interfered with the performance by them of their official duties (R. 15–17, 20).

(4) The Chief of Finance does not function as a bonded disbursing officer (R. 21).

(5) The Comptroller General had no knowledge or information sufficient to form a belief (and the

record contains no evidence) that the petitioner applied to the President for retirement and was by direction of the President placed on the retired list (R. 13).

(6) The Congress has never specifically provided any appropriation authorized to be used for payment of retired pay and allowances to enlisted natives of the Philippine Scouts, and the War Department has never brought to the attention of the Congress in any formal official manner that the retirement of enlisted natives of the Philippine Scouts either was contemplated or had been accomplished (R. 21–22).

(7) No appropriated moneys are available to pay the petitioner retired pay and allowances (R. 21, 22, 23, 47, 48).[3]

(8) There has been no unlawful or improper failure, omission, or refusal to pay petitioner retired pay (R. 22–23).

The answer of the Comptroller General, moreover, categorically and repeatedly denied the allegations of the petitioner's bill of complaint that the petitioner is entitled to retired pay and allowances and the allegations and conclusions thereof that appropriated moneys of the United States are available and authorized to be used for making payment of such retired pay and allowances to

[3] The statements in petitioner's brief (pp. 7 and 35–36) concerning balance available in appropriation "Pay of the Army", 1932, if material, are not supported by the record.

the petitioner as well as the allegations and conclusions of the bill that the petitioner has been retired in accordance with existing laws and that he is entitled under the laws to retired pay and allowances as claimed by him (R. 12–24).

On May 10, 1932, the then Attorney General addressed a letter to the Secretary of War concerning his understanding as to the nature of the petitioner's present proceeding, in pertinent part as follows:

> There are many suits brought in the District and elsewhere against officers of the United States which involve matters in which the United States alone is really interested. *A suit against the Comptroller General and the Chief of Finance of the Army, the purpose of which is to compel the payment of money out of the public Treasury, is as much a suit against the United States as if the United States were named a party.* The officers named as defendants have no personal interest whatever in the controversy. It is the established practice in such cases for the Attorney General to take charge of the *defense* of such cases, the appearances for the defendant officials being made by the United States Attorneys.
>
> * * * * *
>
> Under these circumstances it seems appropriate for me to confirm my oral request that the answer or return interposed for the Chief of Finance in the Miguel case by the

officials of the Judge Advocate General's Department be withdrawn, and that any answer or return required to be filed, be filed by the United States Attorney. *I am informed that the United States Attorney suggests that there are grounds on which this suit ought to be dismissed independent of the merits and that the return interposed for the Chief of Finance by the Judge Advocate General's office would seriously embarrass him in the position he has taken.* * * * (Italics supplied.)

SUMMARY OF ARGUMENT

1. The statutory laws of the United States not only authorized, but required, the Comptroller General of the United States to render his official decision on the question on which his decision was requested by the Army disbursing officer, of whether payment was authorized on the voucher covering the petitioner's claim for retired pay and allowances.

2. The record does not show any facts establishing it is the plain legal duty of the Chief of Finance, United States Army, to pay, or to cause any bonded disbursing officer to pay, retired pay and allowances to the petitioner.

3. A decree for injunction in accordance with the prayers of the petitioner's bill would be contrary to law.

ARGUMENT

I

This Court will notice that what primarily is brought in question by the petitioner is the constitutional control (Article 1, section 9, clause 7) by the legislative branch over the uses of public moneys, as maintained through the appropriation acts and the duly constituted accounting officers and that there is not involved any personal interest of the Comptroller General. The form of the proceeding here adopted by petitioner has for its object the frustration of such legislative control over public moneys by the coercion of a subordinate administrative official to make payment to petitioner on his disputed claim against the United States for retired pay under a general appropriation not conceded to be available for such purpose, as contrasted with the procedure which has been authorized by Congress under the Tucker Act of a suit on the merits in the Court of Claims, as to which any judgment obtained by the petitioner would be for submission to the legislative branch for an appropriation; payment thereunder to be made on settlement by the General Accounting Office.[4]

[4] Act September 30, 1890, 26 Stat. 537, as amended (31 U.S.C. 226); act February 18, 1904, 33 Stat. 401, as amended by section 304, act June 10, 1921, 42 Stat. 24 (31 U.S.C. 228); section 13 of Title II, act March 3, 1933, 47 Stat. 1516, amending the act of March 3, 1875, 18 Stat. 481 (31 U.S.C. 227; see, also, act April 10, 1928, 45 Stat. 413).

The Court of Appeals for the District of Columbia (R. 46–47; 66 F. (2d) 56[illegible] held:

> * * * The Comptroller General when applied to by the disbursing paymaster of the Army, was required by law to decide the question of appellee's [petitioner's] right to retired pay. The right was regarded as doubtful by the disbursing officer, and in order to protect himself * * * if payment should ultimately be held not valid, he applied in accordance with law, to the Comptroller General for an advance opinion. * * *

The Court of Appeals (R. 48; 66 F. (2d) 567) further held:

> * * * The decision of the Comptroller General, however, does not affect the status of the petitioner so far as the retirement order is concerned, and that question need not be passed on. The Comptroller General's action affects merely his right to retired pay, and that depends upon whether Congress has provided the right to such retired pay and has made an appropriation accordingly. As to that the Comptroller General, in his capacity as head of the accounting office of the government, has the right of determination, for it is unlawful for any sum to be paid out of the Treasury of the United States except according to law, and the duty of the Comptroller General is primarily to determine that question. * * *

On this, the petitioner's brief under Point VIII of the Argument (p. 35) says:

> The matter of the availability and application of an existing appropriation to the discharge of the petitioner's retired pay was a question within the jurisdiction of the Comptroller General; and until overruled by the Courts, his position upon this phase of the case is admittedly binding.
>
> * * * Being within the scope of his lawful jurisdiction, the Courts will not disturb it, unless it be arbitrary and capricious, unreasonable, or clearly and obviously wrong. * * *

A 237-page printed brief was filed, *amici curiae,* in the Court of Appeals of the District of Columbia by able counsel from the War Department, Office of the Judge Advocate General, urging the merits of petitioner's right to be retired and to be paid retired pay and allowances forthwith, out of public moneys. The petitioner's chief counsel, a former acting Judge Advocate General of the Army, likewise filed a printed brief and the four judges who sat in the Court of Appeals heard said counsel from the War Department and petitioner's counsel at length (R. 41, 42). No brief or argument on the merits of the petitioner's right to retirement, etc., was presented on behalf of the Comptroller General by reason that counsel in the General Accounting Office and in the Office of the United States Attorney for the District of Columbia who appeared

in the case did not regard the merits of the petitioner's claim against the United States for retired pay and allowances as open to inquiry, in this *ex parte* proceeding thereon.

The four judges of the Court of Appeals were unanimous in holding that the order of retirement promulgated by the Chief of Staff, at the direction of the Secretary of War, was not a conclusive finding that petitioner is a retired soldier, but that at best the status which petitioner claims is doubtful, and that the decision of the Comptroller General denying petitioner's right to pay constituted a reasonable and proper decision, conclusive so far as the executive branch of the Government is concerned.[5]

It is conceded on the record (R. 20) before this Court that the decision of the Comptroller General on the claim of the petitioner—

> * * * followed a practice which the Government accounting officers have fol-

[5] During the argument Justice Van Orsdel of the Court of Appeals, inquired of counsel for the Comptroller General whether a practice had obtained to recognize as conclusive a retired status as determined administratively and was cited by counsel to the case, among others, of *Cloud* v. *United States*, 43 Ct. Cls. 69, 81, wherein as Assistant Attorney General, in a suit for retired pay brought by an Army officer against the United States under the Tucker Act, where the merits of the claim to retired pay were open to inquiry, the Justice himself had made substantially the argument to the Court of Claims which the War Department was making in the case of petitioner, that administrative action is conclu-

> lowed without interruption, at least, since the act of March 30, 1868, 15 Stat. 54, to decide every question of law and of fact necessary to be decided in determining whether payment on a claim is authorized under existing appropriations, except only in those rare cases where the Congress has by specific language made the finding or decision of some other official conclusive on the question of whether payment is authorized.

The Congress has plainly expressed its purpose in the statute when it has been intended to make the action of some executive or administrative official conclusive on the accounting and disbursing officers in the matter of payment from the Treasury; for example, section 305 of the World War Adjusted Compensation Act (43 Stat. 124), provided:

> Immediately upon the enactment of this Act the Secretary of War and the Secretary of the Navy shall ascertain the individuals who are veterans * * * and, as to each veteran the number of days of oversea serv-

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sive on question of retired status. In accordance with many decided cases the Court of Claims held (43 Ct. Cls. 69) that the question of right to retired pay is not controlled by administrative or executive action but that rank as well as pay of retired persons is entirely within the control of Congress, it being the law which is for consideration in adjudicating a claim for retired pay. This Court will notice, moreover, that none of the scores of such decided cases ever could have reached the courts for judicial decision on the merits as to legal status or pay under the view contended for by the petitioner.

> ice and of home service * * * for which he is entitled to receive adjusted service credit, and their findings shall not be subject to review by the General Accounting Office, and payments made by disbursing officers of the U.S. Veterans' Bureau made in accordance with such findings shall be passed to their credit.

It will be noticed, however, that in this instance where the Congress vested the final discretion of deciding the law for the Executive Branch, as to former military personnel, in the Secretary of War the Congress itself by most specific language in section 202 of the same act (43 Stat. 122) limited the discretion of the Secretary of War by providing he should not recognize service as an enlisted man in the Philippine Scouts such as the petitioner bases his claim for retired pay and allowances upon, the language of the act in this respect being as follows:

> SEC 202. In computing the adjusted service credit no allowance shall be made to—
>
> * * * * *
>
> (c) Any civilian officer or employee of any branch of the military or naval forces * * * *Philippine Scout,* member of the Philippine guard, member of the Philippine Constabulary, member of the National Guard of Hawaii, member of the insular force of the Navy, member of the Samoan native guard and band of the Navy, or Indian Scout—in each case for the period of service as such. (Italics supplied.)

The act of May 23, 1930, 46 Stat. 375, made certain action of the Secretary of the Navy conclusive, both on the courts and on the disbursing and accounting officers of the United States, involving the retirement and transfers to the reserve forces of certain personnel under his jurisdiction.[6]

Prior to this act specifically making the action of the Secretary of the Navy conclusive, questions as to the validity of such assignments of grades and ratings and of retirements and transfers to the Reserve Forces had been decided, under jurisdiction vested by general statutes, in the United States Court of Claims, in the Office of the Attorneys General and in the Government accounting offices. *Lawless* v. *United States,* 59 Ct. Cls. 224; *Garrison* v. *United States,* 59 Ct. Cls. 919; *Beeman* v. *United States,* 65 Ct. Cls. 431 (all denying claims against the United States for pay for service rendered, on the ground appointments or promotions under Navy

[6] Section 1, act of March 8, 1928, 45 Stat. 248, as amended (39 U.S.C. 465a), provides that in the award and interpretation of certain contracts for air-mail service the decision of the Postmaster General shall be final and not subject to review by any officer or tribunal of the United States except by the President and the Federal Courts. Likewise, in section 10t, act July 2, 1926, 44 Stat. 784, 788–789, as amended (10 U.S.C. 310t), it is provided the decision of the Secretary of the department concerned as to the award, interpretation, application, and administration of contracts for aircraft, aircraft parts, etc., shall not be reviewable, otherwise than in the act provided, by any officer or tribunal of the United States except the President and the Federal Courts.

Department to grade or rank in which pay was claimed, were invalid in each case); 31 Op. Atty. Gen. 173; 24 Comp. Dec. 659, 660; 25 *id.* 696; 4 Comp. Gen. 636; 10 *id.* 66–69.

The right of the Comptroller General to decide pay rights based on such assignments or promotions under the Navy Department before the act of May 23, 1930, 46 Stat. 375, became effective making the action of the Secretary of the Navy conclusive, was challenged in a proceeding for mandamus brought in the Supreme Court of the District of Columbia, *Arthur Edward Davies* v. *The Comptroller General of the United States, The Treasurer of the United States, The Secretary of the Treasury, and The Secretary of the Navy,* Law No. 77476. The answer of the Comptroller General in that case was filed January 15, 1930, and the record shows that the petitioner, Davies, entered the Naval Service as an enlisted man August 21, 1895, served in enlisted grades in the Navy and in the Army, and in warrant and commissioned grades in the Navy and in the Naval Reserve Force until October 2, 1920, as of which date, having been found by a Naval Retiring Board to be incapacitated for active service and by direction of the President, he was placed on the retired list of the Naval Reserve Force in the grade and rank of lieutenant.[7] When the account of Davies came before

[7] This retirement was announced as in conformity with the provisions of section 2, act June 4, 1920, 41 Stat. 834.

the Comptroller General the official service record presented in support of the account did not establish that the requirements of law as to examination, etc., had been complied with in connection with Davies' appointments and promotions in commissioned grade and accordingly it was held in connection with the settlement of the account that Davies was not entitled to the retired pay of a lieutenant. The mandamus proceeding was for the purpose of compelling payment to Davies of the retired pay of a lieutenant.

Justice Bailey of the Supreme Court of the District of Columbia entered judgment on the demurrers to petitioner's traverse of the respondents' answers and dismissed the petition with costs against petitioner entering his opinion April 25, 1930, by written endorsement in the file, as follows:

> The rights claimed by the petitioner are not, in my opinion, so clear as to justify the issuance of the writ of mandamus. His rights if any, should, I think, be set up in the Court of Claims.
>
> The demurrer's to the traverse will be sustained.

The counsel representing petitioner in the present proceedings heretofore has endeavored to have the Supreme Court of the District of Columbia

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authorizing retirement of reserve and temporary officers of the Navy who had incurred disability in line of duty under the same conditions provided for officers of the Regular Navy (sections 1448 to 1457, Revised Statutes).

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assume the duties enjoined by law upon the General Accounting Office and the Comptroller General of the United States in the case (Equity No. 47040) of James R. Jacobs, a retired major, U.S. Army, wherein mandatory injunction was sought against Dwight F. Davis as Secretary of War and Kenzie W. Walker as Chief of Finance, U.S. Army, to compel them to pay the retired major the rate of pay he conceived himself entitled to, and a prohibitory injunction against the Comptroller General of the United States to enjoin the latter from settling the accounts in accordance with law. In that case there had been a withholding of the pay the accounting officers had found to be due the major and application thereof to adjust prior overpayments made to him. Counsel for the petitioner read to the court an exhaustive typewritten brief endeavoring to establish that the court, having jurisdiction of the case under *McCarl* v. *Pence,* 18 F. (2d) 809, to direct payment of the pay so withheld, should do full justice and direct the future payment of retired pay to Major Jacobs at $300 per month, the rate he conceived the law entitled him to receive, instead of at $225 per month, the rate determined to be due him, under the applicable statutes, by the General Accounting Office. Justice Hoehling, who decided the *Cox case,* (8 F. (2d) 669, certiorari denied 270 U.S. 652), in that court, entered a memorandum opinion in the *Jacobs case* on November 21, 1927, which, insofar as it involves the rights of officers and enlisted men

to have that Court determine the rates of pay due them, it would seem should have been accepted by that court as controlling of the present proceedings. The opinion in pertinent part is as follows:

> *Aside from the question of the deductions so made from plaintiff's salary, it is insisted by plaintiff that, under the provisions of applicable law, his salary, while on active duty, should be $300 per month, whereas defendants insist that his lawful salary is but $225 per month. Accordingly, plaintiff seeks injunctive relief herein; (a) fixing his salary, accrued and accruing, at the rate of $300 per month* [italics supplied]; and, (*b*) concerning the deductions so heretofore made from his pay, under the stoppage orders, *supra*.
>
> *So far as concerns ground (a) the Court is of opinion that the same is not properly the subject of relief herein; and, as to that, the decree to be entered herein shall be that the bill is dismissed, but without prejudice to the right of plaintiff to file appropriate suit for the recovery of such additional amounts of salary, accrued and accruing, as he may conceive himself lawfully entitled to receive.* (Italics supplied.)
>
> As to said ground, (*b*) the decree may provide for payment of the amount of deductions so made from plaintiff's pay, by reason of the stoppage orders complained of herein. (*Pence* v. *McCarl et al., 55 Wash. L.R. 414.*)
>
> A. A. HOEHLING, *Justice.*
>
> NOVEMBER 21, 1927.

Numerous proceedings by injunction were brought in the Supreme Court of the District of Columbia (by counsel representing the petitioner in this case) against the Comptroller General and the Director of the Veterans' Administration with the object of compelling payment of double retired pay to retired emergency officers [8] who also had a retired status in the regular services. The bills of complaints in those cases were dismissed and none were appealed except the case of *Stradley* v. *McCarl etc. et al.,* Equity No. 51073, in which Justice Stafford dismissed the bill of complaint on March 24, 1930. The appeal to the Court of Appeals of the District of Columbia (No. 5223) was dismissed by the present petitioner's counsel after that Court had decided the case of *U.S. ex rel. Bowling* v. *Hines,* 50 F. (2d) 330, to which latter case the Comptroller General was not a party.

In a decision entered by Mr. Chief Justice McCoy June 10, 1927, in a mandamus proceeding against the Comptroller General wherein there was sought to have the Supreme Court of the District of Columbia review, as on writ of error, the action of the respondent, Comptroller General of the United States, in reference to his official duties, *United States ex rel, Metellus Thomson, Jr.* v. *J. Raymond McCarl, Comptroller General of the United States,* At Law No. 73173, the rule heretofore recognized as controlling of such cases brought in the Supreme

[8] Act May 24, 1928, 45 Stat. 735.

Court of the District of Columbia is concisely stated, as follows:

> Relator demurs to the answer of respondent to a rule to show cause why a writ of mandamus should not issue directing the respondent to transmit or cause to be transmitted to relator a check of the United States for certain amount claimed to be due him.
>
> * * * * *
>
> The court is asked to tell the Comptroller how to proceed. It is well settled that this may not be done. See *United States* v. *Lynch,* 137 U.S. 280. This point was not decided in that case, but the opinion refers to the decision of this court to that effect which it was sought to review. The point is decided in many cases and adversely to relator's contention.
>
> A direction to the respondent as asked would be futile. *Howden & Co.* v. *Standard Shipbuilding Corporation,* 17 F. (2d) 530.
>
> The demurrer is overruled.

The ruling of the Supreme Court of the District of Columbia in the present case, in failing to recognize that it was the statutory official duty of the Comptroller General to decide the question of petitioner's right to pay thus was in conflict with the precedents of that Court.

The ruling of the Supreme Court of the District of Columbia in the present case likewise was in conflict with the decisions of the Court of Appeals of the District of Columbia holding that the duty of

the Comptroller General of the United States to decide for the executive branch of the Government whether payment on a claim against the United States is authorized involves judgment and discretion which will not be controlled by mandamus or injunction.

U.S. ex rel. L. Margulies & Sons, Inc., v. *McCarl*, 10 F. (2d) 1012, 56 App.D.C. 147, certiorari denied, 273 U.S. 696.

McCarl v. *Walters*, 59 App.D.C. 237, 38 F. (2d) 942.

McCarl v. *U.S. ex rel. Leland*, 59 App.D.C. 362, 42 F. (2d) 346, certiorari denied, 282 U.S. 839.

McCarl v. *Rogers*, 60 App.D.C. 111, 48 F. (2d) 1023.

McCarl v. *Hoeppel*, No. 5945 App.D.C., decided December 18, 1933, and set forth in Appendix A, pp. 57–59, *infra*.

The proceeding of the petitioner by injunction to recover retired pay as a retired enlisted man of the U.S. Army, which the Comptroller General of the United States has decided is not authorized to be paid under existing laws and appropriation acts, has no support from cases such as *Smith* v. *Jackson*, 241 Fed. 747, 761, affirmed 246 U.S. 388; *McCarl* v. *Cox*, 8 F. (2d) 669, certiorari denied 270 U.S. 652; and *McCarl* v. *Pence*, 18 F. (2d) 809, for in those cases, as decided, there was no dispute that the plaintiffs were officers of the United States, that the Government accounting and disbursing

officers had determined the plaintiffs were entitled to the sums claimed as pay or salary; that an appropriation was available in the hands of the defendants from which to make the payments; and that it was the duty of the defendants to make the payments as claimed. The only dispute in those cases was whether under such circumstances defendants had authority to withhold the pay or salary so determined as due and apply it, against plaintiffs' wills, to debts defendants alleged were due from plaintiffs to the United States on other accounts but which indebtedness the plaintiffs denied.

In the present proceeding there is no such situation, but it is the question whether the petitioner is entitled to retired pay and allowances which is in dispute between the petitioner and the Government accounting and disbursing officers. The distinction between the present case and the cited cases of *Jackson, Cox,* and *Pence* was so clearly stated by the then Solicitor General (William D. Mitchell), in his memorandum of December 17, 1927, directing appeal to the Court of Appeals of the District of Columbia in the cited case of *McCarl* v. *Rogers*—wherein the Supreme Court of the District of Columbia had issued mandatory injunction directing payments to be made by the Secretary of the Navy to a Navy officer who had filed a claim for refund under the act of May 26, 1926, 44 Stat. 654—that

the following extracts therefrom are suggested as a correct exposition of the law:

> It is for the General Accounting Office to determine in the first instance whether the conditions specified in this Act have been complied with and whether the facts exist which authorize payment of the withheld pay. If he decides against the officer, the latter's remedy is an action in the Court of Claims * * * under the Tucker Act to recover compensation, and in such litigation his right may be determined by the courts and the action of the accounting officers thus reviewed by the courts. I do not believe that the question whether the facts exist or the conditions have been complied with, which are specified in the Act of May 26, 1926, as conditions precedent to the payment of the withheld compensation, may be inquired into by a court in a mandamus or injunction suit against the accounting or disbursing officers any more than could the merits of the Government's claim for refund of the dependency allowances be considered in *Cox* v. *McCarl* and like cases.
>
> * * * * *
>
> Where the statutes fix the officer's compensation and direct it to be paid and appropriate money for its payment, *and the fact that a man is an officer and the amount of his compensation and availability of the appropriation have all been determined and settled by the accounting and disbursing officers,* there is nothing left for them to de-

cide, and in the absence of any statute authorizing withholding pay for claims of the United States, they may be compelled by mandamus or mandatory injunction to obey the mandate of the law. But the moment there is introduced such elements as are brought into this case by the Act of May 26, 1926, and the pay is by statute directed to be withheld unless certain facts are found to exist and certain conditions are complied with, a decision by the accounting officers upon the claim is made necessary, and *while the decision of the accounting officers is not final and conclusive in the sense that it is not subject to review in any court, and although it may be reviewed in an action brought by the officer in the Court of Claims * * * under the Tucker Act, there is no support for the claim that the merits of the officer's right under such a statute as that of May 26, 1926, may be passed on in a mandamus or injunction suit.* I think, this distinction between cases like *Cox* v. *McCarl* and the present cases is clear. *The only reason mandamus or injunction was allowed in those cases was because there was nothing to decide and no question of the merits to be considered.* (Italics supplied.)

The rule was stated similarly by the late Chief Justice Taft at page 81 of his book, *Our Chief Magistrate and His Powers,* where it is said:

Then consider the drawing of money from the Treasury Department under an appro-

> priation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial. If the claim is rejected by him, the claimant may in some cases carry his case into the Court of Claims, but if he decides for the claimant, the public and those interested in maintaining the side of the government have no appeal, and his decision is final.

One case, on all fours with the present case, appears to have come before this Court wherein the accounting officers of the Treasury, to the duties of whom the General Accounting Office and Comptroller General have succeeded, were attempted to be directed, through the extraordinary writ of the Supreme Court of the District of Columbia, to decide a disputed claim in a particular way.

In that case, the case of *United States ex rel., Lisle* v. *Lynch* (1890), 137 U.S. 280, in affirming on writ of error a judgment of the Supreme Court

of the District of Columbia dismissing a petition for mandamus to compel the Government accounting officers to audit the mileage account of a Navy officer and to issue a warrant to pay the same in an amount the officer conceived to be due him, Mr. Chief Justice Fuller, delivering the opinion of this court, after reviewing the statutes fixing the duties of the Government accounting officers with respect to the public accounts, said (pp. 285–287):

> It is now argued that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the Act of 1835 and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. * * *
>
> We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, but that what is claimed is that, in the exercise of a valid authority, the Auditor and Comptroller erred in respect to an allowance, in view of the decision of this court in another case.
>
> * * * * *
>
> *The contention of the relator is that the interpretation he puts upon the Act is too obviously correct to admit of dispute and*

> *that this court has so decided;* but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. *What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant.* * * *
>
> Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller, other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case. (Italics supplied.)

That a claimant may not have a mandamus or mandatory injunction in the Supreme Court of the District of Columbia to compel payment to him of pay or salary he conceives due him, but right to which the Government accounting and disbursing officers question, was settled also in the case of a Navy officer, *Brashear* v. *Mason* (1848), 6 How. 92, wherein, after reciting the manner in which public moneys are authorized to be disbursed, it is stated:

> It will not do to say that the result of the proceeding by mandamus would show the title of relator to his pay, the amount, and whether there were any moneys in the treas-

> ury applicable to the demand, for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department by means of this writ, and the proceeding by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals.

The following support the same rule:

United States ex rel., Goodrich v. *Guthrie,* 17 How. 284.
Decatur v. *Paulding,* 14 Pet. 497.
Case v. *Terrell,* 11 Wall. 199.
Hagood v. *Southern,* 117 U.S. 52, 71.
22 R.C.L. 492, 494 (secs. 172, 173).

It is not necessary that every reason be legally sufficient or correct which is assigned by an officer of the United States in the course of arriving at his decision on a matter committed to his official discretion. Even when a wrong reason is given by such officer for his decision, that constitutes no ground for the Supreme Court of the District of Columbia to require him by mandamus or injunction to revoke the decision: *Denby* v. *Berry,* 263 U.S. 29, 36; *United States ex rel., Lisle* v. *Lynch,* 137 U.S. 280, quoted *supra.*

The settled rule respecting the official decision of an officer of the United States has been succinctly stated by this Court in *United States ex rel.*

Riverside Oil Company v. *Hitchcock*, 190 U.S. 316, 324–325, as follows:

> * * * Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

When consideration is had of the rule which has been adopted by the courts that the United States is bound by a decision of the Comptroller allowing active pay or retired pay to those claiming as officers or employees of the United States, whereas the claimants' substantive legal rights are not affected but they are left free to proceed against the United States in the Court of Claims to have their rights judicially decided (*St. Louis, Brownsville & M. Ry. Co.* v. *United States*, 268 U.S. 169, 173–174; *United States ex rel. Skinner and Eddy. Corp.* v. *McCarl*, 275 U.S. 1), it becomes even more clear why the courts have declared the Comptroller General may not be directed by mandamus or injunction to decide a claim, presented for his decision, in a particular way.

In the case of *McElrath* v. *United States*, 102 U.S. 426, it appeared that by order dated June 19, 1866, the Secretary of the Navy, G. Wells, dismissed First Lieutenant Thos. L. McElrath from his office

in the U.S. Marine Corps. By order of July 10, 1873, Secretary of the Navy Robeson revoked the order of dismissal and by order of January 8, 1874, accepted Lieutenant McElrath's resignation effective July 10, 1873 (12 Ct. Cls. 203–204). In January 1874 McElrath presented his claim to the Fourth Auditor of the Treasury, for pay as an officer, and the Fourth Auditor and the Second Comptroller of the Treasury (to the powers and duties of whom the Comptroller General has succeeded, with the added proviso they "shall * * * be exercised without direction from any other officer", section 304, act June 10, 1921, 42 Stat. 24, 31 U.S.C. 44), after examining the law and the facts (argument for claimant 12 Ct. Cls. 207) found due and certified for payment to McElrath over $6,000 as half pay and allowances of a first lieutenant of Marines for the period June 21, 1866, to July 10, 1873. McElrath accepted the payment declaring at the time he believed the sum was not the entire amount due him (12 Ct. Cls. 204–205) and then brought his suit in the United States Court of Claims for the difference between *full* pay and allowances and the amount the Government accounting officers had found due him (12 Ct. Cls. 205). The United States Court of Claims decided (p. 214), that McElrath was not an officer in the Marine Corps during the period covered by his claim and gave judgment in favor of the United States for what the Government accounting officers

(Fourth Auditor and Second Comptroller) had allowed and certified for payment to him under a mistaken construction of law (12 Ct. Cls. 201). In affirming the judgment (102 U.S. 426, 441) this Court pointed out that *had claimant McElrath rested on the settlement of the Government accounting officers he might have been entitled to invoke the rule that money paid in mistake of law cannot be recovered* but that his suit—

> invites the court to go behind that settlement, to reexamine all the questions arising out of the claim of appellant for full pay and allowances, and to correct the error which he insists was committed to his prejudice by the accounting officers of the Government—

and, therefore, the Government having met him on his own chosen ground was entitled to recover the payment made to him without authority of law.

This case plainly recognizes the duty resting upon the accounting officers of the Government (now the General Accounting Office and the Comptroller General) to inquire into the legal status of one claiming compensation or salary on the basis of a claimed military status and illustrates how great prejudice may result to the United States if the accounting officers make a mistake of law and certify an amount for payment when no payment is authorized by statute, as well as the reason the Government accounting officers feel bound to reserve doubtful questions of legal right to payment

for decision by the judiciary in authorized proceedings under the Tucker Act, as was done in the case of *Geddes,* 38 Ct. Cls. 428, and as the Court of Claims declared in that case "they properly might do" (38 Ct. Cls. 442).

In *Mullett* v. *United States,* 21 Ct. Cls. 485, the Court of Claims laid down the absolute rule, that except in cases like the *McElrath case, supra,* in which the payee himself brought an action at law on the identical claim settled and decided by the Government accounting officers, thus opening it for judicial adjustment, or in a case where fraud or mistake of fact is established, the United States may not recover unauthorized payments made pursuant to settlements or decisions of the Government accounting officers on their mistaken construction of the law.

None of the several hundred suits for pay and allowances which have been filed in the United States Court of Claims by those claiming as officers, enlisted men and employees of the United States ever would have been brought, during more than 70 years since that Court was established, if the Government accounting officers had not previously exercised their discretion thereon to decide against payment of the claims, because they found no appropriation available for payment or found the legal rights asserted against the United States of such doubtful validity that it seemed incumbent to reserve the question for judicial deter-

mination in a suit brought directly against the United States under the Tucker Act.

The cases of *Longwill* v. *United States,* 17 Ct. Cls. 288, 291, *Charles* v. *United States,* 19 Ct. Cls. 316, 319, *Geddes* v. *United States,* 38 Ct. Cls. 428, 442–445, and *Ex parte Rock,* 171 Fed. 240, 241–242; among other cases decided since the act of 1868 (15 Stat., 54), unequivocally declare the duty of the accounting officers to refuse to authorize payment under existing appropriations on a doubtful claim and to reserve the question (claim) for judicial decision in the courts under the Tucker Act.

II

The record does not present any facts establishing it to be the plain legal duty of the Chief of Finance, an unbonded subordinate in the War Department, to pay or to cause any bonded disbursing officer to pay retired pay and allowances to the petitioner.

The Court of Appeals held (R. 47; 66 F. (2d) 564, 566) that the opinion of the Comptroller General was given that payment of retired pay and allowances to the petitioner is not authorized, and once given is binding on the executive branch of the Government, citing in support of its ruling the case of *Skinner & Eddy Corporation* v. *McCarl,* 275 U.S. 1. The rule likewise is settled by practice and precedent that after the Comptroller General had given his decision that payment of the

petitioner's claim is not authorized all officers of the United States were chargeable with knowledge that the payment could not be made under existing appropriations and that the claim is not further for consideration in the executive branch of the Government. *Southern Pacific Co.* v. *United States,* 268 U.S. 263, 265; *Anderson's case,* 59 Ct. Cls. 813, 61 *id.* 201; 21 Op. Atty. Gen. (McKenna) 530, 531; 22 *id.* 581; 23 *id.* 431; *id.* 586, 24 *id.* 85; *id.* 553; 25 *id.* 185; *id.* 614; 26 *id.* 431; *id.* 609; 33 *id.* 265; *id.* 268; *id.* at page 385.

In the case of *Southern Pacific Co.* v. *United States,* 268 U.S. 263, the question was material on what basis payments for transportation were made to the railroad company. This Court (p. 265) said:

> It had been previously ruled by the Comptroller of the Treasury that such persons were to be regarded as troops of the United States and that their transportation could be paid for only on land-grant rates; *and disbursing officers, as the claimant knew, were authorized to make payments on that basis only.* * * * (Italics supplied.)

The Court of Claims, *In Re* Departmental Reference No. 167, decided June 9, 1924, 59 Ct. Cls. 813, considered the question in all its aspects. That case involved the claim of Hubert C. Anderson, a customs official, for subsistence expenses in accordance with a Treasury Department Regulation, and the Treasury Department approved the claim for payment in the full amount. When the account

containing the claim came before the Comptroller General for decision it was decided the Treasury Regulation was contrary to law and that Anderson was entitled to payment in a lesser amount than claimed. The Secretary of the Treasury, purporting to act under section 148 of the Judicial Code, referred the claim to the Court of Claims for a decision just as was done February 15, 1932, by the Secretary of War in the case of the present petitioner's claim (R. 23). The Court of Claims agreed with the Government's contention that the Secretary of the Treasury had not power to settle or pay the claim in excess of what the Comptroller General had decided was authorized to be paid and decided further as follows:

> The disallowance of part of the claim of Hubert C. Anderson was reviewed by the Comptroller General of the United States at the request of the Treasury Department, and the settlement was sustained by his decision rendered December 8, 1923. This ruling is conclusive upon the executive branch of the Government by virtue of the Dockery Act of 1894 and the act of June 10, 1921, 42 Stat., 24. *There being no authority after this decision by the Comptroller General for the* Treasury *Department to settle or pay the claim* it cannot be transmitted by the Secretary under section 148. * * *
>
> * * * * * *
>
> *It is perhaps unnecessary to add that nothing herein said is intended to affect the right*

of any claimant asserting an independent claim against the Government. (Italics supplied.)

Subsequently, the claimant, Hubert C. Anderson, filed his claim directly in the Court of Claims and the Court of Claims decided that he could not recover, on the same ground that the Comptroller General had decided the claim was not authorized to be paid. *Anderson* v. *United States,* decided November 16, 1925, 61 Ct. Cls. 201.

The opinion of the court, In re Proposed Reference by the Secretary of the Navy, decided April 8, 1918, 53 Ct. Cls. 370 (before the passage of the Budget and Accounting Act of June 10, 1921), which gave consideration to a claim for pay, as a commissioned officer, of Chief Machinist Albert A. Hooper, is to the same effect as 59 Ct. Cls. 813, *supra.* In the *Hooper case* the Navy Department, basing its views on an opinion given by the Judge Advocate General of that Department, insisted that Hooper was entitled to pay as a commissioned officer from June 27, 1913, the effective date of his promotion to chief warrant grade fixed in the order of appointment. *Hooper's claim on that basis was disallowed by the Auditor for the Navy Department whose ruling was affirmed by the Comptroller of the Treasury on the ground that the Navy Department action promoting Hooper to commissioned grade effective in 1913 was not pursuant to law, etc.* (53 Ct. Cls. 374). Hooper then sued di-

rectly in the Court of Claims and, in *Hooper* v. *United States,* decided January 7, 1918, 53 Ct. Cls. 90, the court, upon a very full consideration, reached the same conclusion which the Auditor and Comptroller had reached and denied the claim. The Navy Department, still insisting Hooper was entitled to be paid as a commissioned officer from the date the Navy Department (Judge Advocate General) had decided upon, then asked the Court of Claims to take jurisdiction and decide the matter in accordance with the views of the Navy Department under the cited section 148 of the Judicial Code. This the court refused to do, on jurisdictional grounds.

The same rule has been recognized in cases in which suit has been brought on the bonds of disbursing officers of the United States for payments on account of which credit has been disallowed by the Government accounting officers: *Fidelity and Deposit Co. of Md.* v. *United States* (C.C.A. 4–1932), 55 F. (2d) 100; *United States* v. *Moore* (C.C.A. 2), 168 Fed. 36, 24 L.R.A. (N.S.) 309.

The rule was declared succinctly in an opinion (21 Op. Atty. Gen. 530, 531) rendered on May 6, 1897, by the then Attorney General Joseph McKenna to the Secretary of the Treasury. The Secretary of the Treasury had requested an opinion whether Samuel G. Fairchild was entitled to receive any pay under an appointment as special inspector of foreign steam vessels, in view of the sal-

ary he already was receiving under an appointment as local inspector of hulls. Attorney General McKenna refused to give his opinion on the question presented, stating in that connection as follows:

> *If a claim is presented the question of the legality of payment is one exclusively for the Comptroller, whose decision thereon is, by statute, made final as to all executive officers.* It has been repeatedly held by Attorneys General that on questions of disbursement of money or payment of claims, so by law relegated to the Comptroller, the Attorney General should not render opinions, especially in view of the fact that, if the matter is doubtful, it can be referred to the Court of Claims for authoritative decision. (Opinion of May 22, 1895, 21 Opin. 178; opinion of June 8, 1895, 21 Opin. 188), (Italics supplied).

This opinion of Attorney General McKenna was quoted and approved on September 13, 1899, by Attorney General Griggs (22 Op. Atty. Gen. 581), wherein the request of the Secretary of the Treasury for an opinion was refused. In requesting the Attorney General's opinion in a case somewhat analogous to the present case, the Secretary of the Treasury, under whom the Comptroller of the Treasury then was serving administratively, insisted that he was not and could not be bound by the decision of the Comptroller which theretofore had been rendered. He was informed by the At-

torney General that when a claim is presented, the question of legality of payment is one *exclusively* for the Comptroller whose decision, by statute, is made final as to *all executive officers.*

The opinion rendered to the Secretary of War on July 11, 1904, by Attorney General Moody (25 Op. Atty. Gen. 185) is particularly applicable to the present case for in that case the Secretary of War presented two questions, as follows:

> 1. Do officers of the Army on the retired list hold public office, and should the advancement authorized in the act of April 23, 1904 (vesting certain discretion in the President as to retirement of Army officers) be accomplished by an exercise of appointing power?
>
> 2. When a vacancy occurs, or is created by legislative enactment while the Senate is in session, can such vacancy be filled during a recess of the Senate, provided an act or thing is required by law to be done as a condition precedent to such exercise of the appointing power? In other words, must the date when the vacancy occurred, or was created, be alone considered in connection with the exercise of the appointing power, or must the statutes which require certain acts to be done, or which require an exercise of the Executive discretion, be also considered in determining whether a vacancy exists which may be filled by a recess appointment?

The Attorney General discussed these questions and gave his opinion thereon but then cited certain of the prior opinions of the Attorneys General, *supra,* quoting with approval the cited opinion of Attorney General McKenna, and stated:

> I proceed, however, to say that *the practical question underlying both your inquiries is whether upon the exercise of the executive discretion an officer advanced in rank and pay may be paid* at the advanced rate before the Senate has given its consent and advice. *It seems that this question was referred by you to the Comptroller of the Treasury upon a claim for the advanced pay in the account of a retired officer advanced under the statute, and was by him decided in the negative. Under section 8 of the Act of July 31, 1894 (28 Stat. 162, 208), the decision of the Comptroller upon any question involving the payment of money, duly referred to him, must govern in passing upon an account.* * * *
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> * * * here the Comptroller has already acted, and has rendered his decision upon due reference by you of the real question involved, in its practical aspect, and *this decision under the law must govern him in determining the matter whenever it is presented to him, in his function of passing upon accounts, unless, indeed, he himself should see fit to reconsider and revise or reverse his ruling.* (Italics supplied).

The opinion of August 10, 1922 (33 Op. Atty. Gen. 268), rendered by the Attorney General to the Secretary of the Navy also has particular and controlling application in the present case. The pertinent part of the decision is as follows:

> It appears that certain enlisted men in the Navy were tried by summary courts martial, ordered discharged, and sentences approved by the convening authority and carried into execution. Subsequently the matter was referred to you in due course, and you disapproved of the proceedings of the summary courts martial on the ground that they were illegal and without warrant of law, and you thereupon ordered the proceedings set aside. The enlisted men subsequently, in accordance with your decision, were brought back into the naval service, and were paid for the period between the time they were discharged under the sentences of the summary court martial and the time they returned to the service. When the disbursing officer's accounts containing these payments were submitted to the auditor for the Navy Department in due course, he disallowed these payments, and his action was affirmed by the Comptroller General. You applied to the Comptroller General for a reconsideration of the question, which was granted, but, upon reconsideration, the Comptroller General affirmed his previous decision.
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> From the above statement *it will be clearly seen that the actual question pending* before

you *is not as to your power to set aside the judgment of a summary court martial but as to the effect of the exercise of such power on the pay status of the enlisted man* during the period elapsing while the judgment of the summary court martial is in execution and before it has been set aside.

Section 8 of the Dockery Act of July 31, 1894 (ch. 174, 28 Stat. 207), provided that the balances certified by the auditors of the Treasury, or upon revision by the Comptroller of the Treasury, should be final and conclusive upon the executive branch of the Government, and that where disbursing officers, or the head of any executive department, applied to the Comptroller of the Treasury for his decision upon any question involving a payment, the decision, when rendered, should govern the case. Construing these provisions of law, my predecessors have uniformly held that a question of pay for the determination of the Comptroller cannot be submitted to the Attorney General for his opinion merely because it may incidentally involve some power or the effect of some power claimed to exist in the head of a department. (See, for example, 25 Op. 301, 28 Op. 129.) The same rule necessarily applies to the Comptroller General, in whom is vested all the power formerly conferred by law upon the Comptroller of the Treasury. (Act of June 10, 1921, ch. 18, sec. 304, 42 Stat. 20, 24.) (Italics supplied.)

It seems plain from the decided cases and the opinions of the Attorneys General that there is no authority vested by statute in the Chief of Finance to pay or to cause payment to be made by a bonded disbursing officer to the petitioner of the retired pay and allowances which the Comptroller General has decided are not authorized to be paid.

It would seem plain, also, there was no power in the Supreme Court of the District of Columbia, through its decree for mandatory injunction, to command the Chief of Finance, an unbonded subordinate in the War Department, to pay out public moneys. The exercise of such power by the court would disrupt the whole accounting for Government funds and is unsupported either by law or precedent.[9]

III

A decree in accordance with the prayers of the petitioner's bill would be contrary to law.

The decision of the Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the Government. Act July 31, 1894, section 8, 28 Stat. 162, 207, following the provisions of the earlier act of March 30, 1868, 15 Stat. 54; section 304, act

[9] The petitioner's bill may be subject to dismissal also on the ground the Secretary of War, to whom the Chief of Finance is subordinate, is not named a party in the present proceeding for injunction which fact appears on the face of the record. *Webster* v. *Fall*, etc., et al., 266 U.S. 507.

June 10, 1921, 42 Stat., 24; *United States ex rel. Skinner & Eddy Corp.* v. *McCarl, etc.*, 275 U.S. 1, 4–5; In re Departmental Reference No. 167, 59 Ct. Cls. 813.

Such a decision is required to be rendered "without direction from any other officer." (Section 304, act June 10, 1921, 42 Stat. 24, 31 U.S.C. 44; Brief of the Comptroller General in Opposition to the petition herein, p. 31.)[10]

No Court may direct the decision of the Comptroller General to be rendered in a particular way. *James Howden & Co.* v. *Standard Shipbuilding Corporation* (CCA 2) 17 F. (2d) 530, 532; In re Departmental Reference No. 167, 59 Ct. Cls. 813; *Brumback* v. *Denman, etc.*, decided June 5, 1933, Law No. 3316, U.S. District Court for the Northern District of Ohio, Western Division, denying a motion filed therein in the nature of a mandamus to

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[10] Attorney General Roger B. Taney rendered an opinion to the President on April 5, 1832, 2 Op. Atty. Gen. 507, holding the rule then to be what the cited statute now specifically declares, the opinion being accurately summarized in the synopsis as follows:

"Where the account of General Taylor had been settled by the accounting officers, and a balance found against him, for which suit had been commenced; and a memorial

the Comptroller General of the United States. A copy of the latter opinion, which has not as yet been reported, is annexed as Appendix B, pp. 61–62.

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was subsequently presented by him to the President, requesting the discontinuance of the suit on account of alleged errors in the settlement, *held*, That the decision of the Comptroller was conclusive upon the executive branch of the Government; and that the President does not possess the power to enter into the correctness of the account for the purpose of repairing any errors which the accounting officers may have committed."

This opinion of Chief Justice Taney, while Attorney General, conforms with what Attorney General Wirt had held on references to him by the President. 1 Op. Atty. Gen. 624, 629; *id.* 636; *id.* 705, 706. President Jackson recognized these opinions of Attorneys General Wirt and Taney as stating the correct rule of law and on July 8, 1834, directed the Secretary of War to suspend further proceedings on the claim of General Parker which Attorneys General Berrien and Butler (2 Op. Atty. Gen. 302; *id.* 652) had held the Secretary of War might review and allow after it had been disallowed by the Second Comptroller. The entire history of the episode and the views of the several Presidents on the question involved are set forth in the opinion of Second Comptroller Hiland Hall of February 10, 1851, published pp. 510 to 533 of Volume I, Decisions of First Comptroller Lawrence.

Peebles and Graham, contractors for supplies in the Subsistence Department of the Army whose claim now is in the

A decree in accordance with the prayers of the petitioner's bill would be contrary also to section

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settled files of the General Accounting Office were found indebted by settlement of Third Auditor Peter Hagner on June 30, 1835, under their contract to supply beans and settlement was affirmed by the Second Comptroller. By endorsement of July 1, 1835, the War Department referred the contractors' protest to the President of the United States for his decision. The opinion of President Jackson, announced by the War Department to the contractor on July 3, 1835, is endorsed on the papers now on file, in President Jackson's own original autograph, as follows:

"Referred to the Secretary of War for his report of this case—and the rules of the Dept. in like cases.—A.J.

"The report made—Atts General opinion referred to—The President has no power over such cases—The decision of the second Comptroller is final, over whose decisions the President has no power except by removal. The Secretary of War will make this decision known to Mr. Peebles.—A.J." (Quoted incorrectly, Vol. I, Decisions of First Comptroller Lawrence, 523.)

Secretary of War, L. Cass, advised Peebles and Graham July 3, 1835, as follows:

"The report of the Commy Genl of Subsis., with the papers in relation to yr contract of * * [date illegible] Oct. '34, to furnish a quantity of beans for the Army of the U.S. has been submitted to the President. He is of opinion that they present a case, in which it is not proper for him to interfere. The decision of the 2d Compt is final, & must be so rec'd, unless Congress shall provide relief."

267 of the Judicial Code, act of March 3, 1911, 36 Stat. 1163 (28 U.S.C. 384) which provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Aside from this controlling statute the rule declared is as old as the earliest period in the recorded history of English equity jurisprudence, and it is the general practice of courts of equity to dismiss a bill of complaint to recover realty, money, compensation, etc., if it be grounded merely on an alleged title: *Lewis* v. *Cocks,* 23 Wall. 466; *Killian* v. *Ebbinghaus,* 110 U.S. 568; *Litchfield* v. *Ballou,* 114 U.S. 190, 192; *Hurley* v. *Kincaid,* 285 U.S. 95, 104; *McKee* v. *Rudolph,* 56 App.D.C. 207, 12 F. (2d) 148, certiorari denied, 273 U.S. 710; *Parkersburg* v. *Brown,* 106 U.S. 487, 500.

In the cited case of *Hurley* v. *Kincaid,* decided *February 23, 1932,* 285 U.S. 95, 104, after both the District Court and the Fifth Circuit Court of Appeals seem to have disregarded the controlling force of this elementary rule in equity jurisprudence, and after a voluminous record had been built up, at great expense and effort on behalf of all parties, this Court reannounced this very plainly established rule, that equity could not entertain jurisdiction because there was an ample remedy at law, namely the right to recover compensation under the Tucker Act (24 Stat. 505) and that such remedy was plain, adequate, and complete.

In the more recent case of *Williams* v. *United States,* 289 U.S. 553, involving a claim of one of the judges of the United States Court of Claims for pay or compensation on the basis that he sat as a judge of a "constitutional" court, this Court (p. 560) said:

> Plaintiff is, and since November 11, 1929, has been, a judge of the Court of Claims of the United States. Since his entry upon the duties of his office, and until June 30, 1932, he received a salary at the rate of $12,500 per annum, as fixed by the Act of December 13, 1926, c. 6, § 1, 44 Stat. 919. Since that date he has been paid at the rate of $10,000 per annum under a ruling of the Comptroller General of the United States. Compare *O'Donoghue* v. *United States,* decided this day, *ante,* p. 516.
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> On February 8, 1933, this suit was brought in the Court of Claims to recover the amount of the difference between the statutory rate of $12,500, and the smaller amount paid under the ruling of the Comptroller General. The suit was brought by plaintiff in the court of which he is a member, *because,* as it is averred, *no other court or remedy was open to him.* * * * (Italics supplied.)

The reserving in the decisions by the Comptroller General of the doubtful questions involved for judicial decision in a direct proceeding against the United States, authorized under the

Tucker Act, neither in that case nor in the present case resulted to prejudice any legal status or right of the claimants. *St. Louis B. & M. Ry.* v. *United States,* 268 U.S. 169, 173–174; *Longwill* v. *United States,* 17 Ct. Cls. 288, 291; *Major Collins's Cases,* 14 *id.* 568 and 15 *id.,* 22. Such reservation by the Comptroller General of doubtful questions for judicial determination did operate, however, to properly conserve and protect the interests of the United States and the authority of the legislative branch over the public moneys. *Mullett* v. *United States,* 21 Ct. Cls. 485, distinguishing *McElrath* v. *United States,* 102 U.S. 426. Also, to make all interested parties secure from possible future litigation which would have been necessary had unauthorized payments been made by the disbursing officer. *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190; *United States* v. *Keehler,* 9 Wall. 83; *Heidt* v. *United States,* 56 F. (2d) 559, certiorari denied, 287 U. S. 601; *Fidelity and Deposit Co. of Md.* v. *United States,* 55 F. (2d) 100; *United States* v. *Moore,* 168 F. 36, 24 L.R.A. (NS) 309; *United States* v. *Dempsey,* 104 F. 197.

As was said by Attorney General Mitchell in his letter to the Secretary of War of May 10, 1932 (p. 9, *supra*), concerning the nature of petitioner's present proceeding,

> A suit against the Comptroller General and the Chief of Finance of the Army, the purpose of which is to compel the payment of money out of the public Treasury, is as

> much a suit against the United States as if the United States were named a party. The officers named as defendants have no personal interest whatever in the controversy.

This Court has stated the rule in a number of cases that although the United States is not named a party the action is one against the United States where the individual respondents have no personal interest in the controversy, where the relief sought is against the named respondents only in their official capacity, and where the United States is "the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U.S. 443, 506; *Belknap* v. *Schild*, 161 U.S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386–387. The United States is an indispensable party if the action is one which may interfere with the performance of governmental functions and vitally affect interests of the United States.[11] *Morrison* v. *Work*, 266

[11] The Court will notice that petitioner has not presented his claim to the General Accounting Office or to the Comptroller General for direct settlement, which presentation would appear necessary to be shown as a condition to any relief by mandamus or injunction irrespective of other aspects of the case (*Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117); also that the now expeditious proceedings available under the Tucker Act in the Court of Claims where the merits might be passed upon have been deliberately avoided.

Had the proceedings been brought against the United States in the Court of Claims no officer or employee of, or person discharging any official function under, the United States might act as counsel, attorney, or agent for petitioner

U.S. 481, 485–486; *Lambert Co.* v. *Balto. & Ohio R.R. Co.*, 258 U.S. 377, 383; *Hopkins* v. *Clemson College*, 221 U.S. 636, 642–643; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68; *Belknap* v. *Schild*, 161 U.S. 10; *New York Guaranty Co.* v. *Steele*, 134 U.S. 230, 232.

A substantial right of the United States "cannot be tried behind its back" (*Louisiana* v. *Garfield*, 211 U.S. 70, 78) and the present proceeding fails under decisions of this Court by reason that the United States is not and cannot be made a party. *Louisiana* v. *McAdoo*, 234 U.S. 627, 628–629; *Goldberg* v. *Daniels*, 231 U.S. 218, 221–222.

The Court of Appeals in its decision of June 26, 1933, directing dismissal of the petitioner's bill of complaint has applied the decisions of this Court correctly. *Gaines* v. *Thompson*, 7 Wall. 347; *Work* v. *United States ex rel. Rives*, 267 U.S. 175.

The Court of Appeals also has applied its own decisions correctly. *Hurley* v. *Shanley* (1932) App.D.C., 60 F. (2d) 335; *McCarl* v. *Rogers*, 60 App.D.C. 111, 48 F. (2d) 1023; *McCarl* v. *U.S. ex rel. Leland*, 59 App.D.C. 362, 42 F. (2d) 346; *Mc-*

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or aid or assist in the prosecution or support of his claim, or directly or indirectly receive compensation therefor, by himself or another. Sections 109 and 113 Criminal Code, 18 U.S.C. 198 and 203; section 190 U.S. Revised Statutes, 5 U.S.C. 99; *Burton* v. *United States*, 202 U.S. 344; *Tyler's Motion*, 18 Ct. Cls. 25; *In re Winthrop*, 31 Ct. Cls. 35; *Case* v. *Helwig* (App.D.C.), 65 F. (2d) 186. Sound public policy may prevent that being done indirectly which may not be done directly.

Carl v. *Walters*, 59 App.D.C. 237, 38 F. (2d) 942; *U.S. ex rel. L. Margulies & Sons, Inc.*, v. *McCarl*, 56 App.D.C. 147, 10 F. (2d) 1012, certiorari denied, 273 U.S. 696; *Lochren* v. *Long*, 6 App.D.C. 486; *Seymour* v. *South Carolina*, 2 App.D.C. 240.

CONCLUSION

It is submitted that looking at the proofs none of the matters appear which would make a proper case for equity and on its own motion, just as the Court of Appeals for the District of Columbia has done, this Court might direct the dismissal of the petitioner's bill for injunction. *Allen* v. *Pullman's Palace Car Co.*, 139 U.S. 658, 662; *Nalle* v. *Oyster*, 230 U.S. 165; *Nat. Sav. & T. Co.* v. *Ryan*, 49 App.D.C. 159, 262 Fed. 613.

It is further submitted that the opinion and judgment of the Court of Appeals of the District of Columbia should be affirmed.

Respectfully submitted.

R. L. GOLZÉ, *General Counsel*,

HARRELL O. HOAGLAND,

Principal Attorney,
General Accounting Office.
(For the Comptroller
General of the United States.)

JANUARY 1934.

APPENDIX A

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5945

J. RAYMOND McCARL, COMPTROLLER GENERAL OF THE UNITED STATES AND FREDERICK W. COLEMAN, CHIEF OF FINANCE, UNITED STATES ARMY, APPELLANTS

v.

JOHN H. HOEPPEL, APPELLEE

Appeal from the Supreme Court of the District of Columbia

Argued November 6, 1933. Decided December 18, 1933

Leo A. Rover, United States attorney, *John W. Fihelly,* assistant United States attorney, and *O. R. McGuire,* all of Washington, D.C., for appellants.

Burr Tracy Ansell and *Samuel T. Ansell,* both of Washington, D.C., for appellee.

Before Martin, Chief Justice, and Robb, Hitz, and Groner, Associate Justices.

ROBB, *Associate Justice:* Appeal from a decree in the Supreme Court of the District overruling appellants' motions to dismiss the bill and (appellants electing to stand on their motions) restraining appellant McCarl, the Comptroller General, from doing anything "to prevent the payment to the plaintiff (appellee) of his retired pay and allow-

ances *without application thereto of any reduction provided by section 106 of the Economy Act of June 30, 1932* (ch. 314, 47 Stat. 382, 401)" from July 1932 to March 3, 1933, inclusive, and commanding appellant Coleman to make such payments. (Italics ours.)

Appellee served honorably in the Regular Army as an enlisted man from July 27, 1898, to February 8, 1918, when he was appointed a commissioned officer. He served as such officer until October 30, 1919, when he was honorably discharged of his commission and resumed service as an enlisted man, in which capacity he served until August 16, 1921, when he was placed on the enlisted men's retired list of the Regular Army with the rank of master sergeant.

Under the provisions of the Economy Act of June 30, 1932 (ch. 314, 47 Stat. 382, 401), the retired pay of warrant officers of the Army (receiving more than $1,000 per annum) was subject to 8⅓-percent deduction (sec. 106). The retired pay of an enlisted man, not then being subject to deduction, was in excess of the pay of retired warrant officers under the Economy Act.

Section 106 of the Economy Act (ch. 314, 47 Stat. 382, 401) provides, *inter alia,* "that the retired pay of all commissioned and other personnel (except enlisted) of the Army, Navy, * * * shall be reduced as follows: * * *."

The Comptroller General ruled that under this provision the pay of retired warrant officers was subject to the economy deduction and that retired enlisted men who were entitled to the pay of retired warrant officers could be paid no more than was currently payable to such officers.

Appellee contended, and the court below sustained his contention, that he was entitled to the pay of a retired warrant officer and that because he was a retired enlisted man he was not subject to the economy deduction applicable to a warrant officer.

But section 111 of the Economy Act provides: "No court of the United States shall have jurisdiction of any suit against the United States or (unless brought by the United States) against any officer, agency, or instrumentality of the United States arising out of the application of any provision of this title, unless such suit involves the Constitution of the United States."

Since Congress may increase or decrease at will the pay of retired officers and men of the Army (*Wood* v. *United States*, 107 U.S. 414), it is plain that the present suit does not involve the Constitution of the United States. It is equally plain, we think, that the suit does arise out of the application of a provision of the Economy Act, namely, section 106 of that act. The Comptroller General has placed one interpretation upon a provision of that section and the court below has placed another, but section 111 of the act expressly withheld jurisdiction from the court in a case involving the application of such a provision.

Therefore, without considering other contentions, we reverse the decree and remand the cause, with directions to dismiss the bill.

Reversed and remanded.

A true copy.
Teste:

_____,
Clerk D.C. Court of Appeals.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Law, No. 3316

ORVILLE S. BRUMBACK, PLAINTIFF

vs.

ULYSSES G. DENMAN, ADMINISTRATOR UNDER WILL OF CHARLES S. NAUTS, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE TENTH DISTRICT OF OHIO

Memorandum Opinion

Plaintiff has filed a motion herein in the nature of a mandamus to the Comptroller General of the United States. I think the motion must be denied.

The Comptroller General of the United States has never been a party to this action and this court has no jurisdiction of his person. If the court had such jurisdiction, it would still be doubtful whether the court would have jurisdiction in a case which would amount to an original case of mandamus against a public officer. (Sec. 716, R.S., as reenacted, Sec. 262, Judicial Code; *Covington Bridge Co.* v. *Hager,* 203 U.S. 109, 110; *Emerson* v. *Baker,* 3 F. (2d) 830, 831; *Barber* v. *Hetfield* (C.C.A. 9) 4 F. (2d) 245, reversing *Hetfield* v. *Barber,* 2 F. (2d) 723; *Winifred E. Scanlan as Administratrix of Patrick J. Scanlan* v. *William E. Hurley, Postmaster at Boston, Mass.,* and *J. Raymond McCarl, Comptroller General of the United States,* United

States District Court for the District of Massachusetts—original petition for mandamus dismissed by District Judge Lowell on February 7, 1933—amended petition dismissed April 14, 1933.)

It is also doubtful whether any court outside of the District of Columbia may issue a writ of mandamus against an officer of the United States. (*Kendall, Postmaster General of the United States* v. *United States, ex rel. Stokes et al.*, 37 U.S. (12 Pet.) 524, 614, 623; concurring opinion of Associate Justice Catron in *United States ex rel. Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 520; *James Howden & Co.* v. *Standard Shipbuilding Corp.* (C.C.A. 2), 17 F. (2d) 530, 532.)

And again, there being a dispute between the plaintiff and the accounting officers of the government, it seems to be the generally accepted rule that mandamus will not lie even in the courts of the District of Columbia to compel the settlement to be made in a particular way or to compel payment contrary to the settlement or decision of the government accounting officers. (*Brashear* v. *Mason*, 47 U.S. (6 How.) 92, 100; *United States ex rel. Goodrich* v. *Guthrie*, 58 U.S. (17 How.) 284; *United States* v. *Lynch* (137 U.S. 280).) See also *James Howden & Co.* v. *Standard Shipbuilding Corp.*, 17 F. (2d) 530 (C.C.A. 2); and *Barber* v. *Hetfield* (C.C.A. 9), 4 F. (2d) 245.

The plaintiff's motion must be denied, with exceptions. An order may be entered accordingly.

(Signed) GEO. P. HAHN,
District Judge.

TOLEDO, OHIO, *June 5, 1933.*

U. S. GOVERNMENT PRINTING OFFICE: 1934